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FILED

2019 JUN -5 PM 1:18

AMY J. HUNLEY
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CAPT

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,

Plaintiff,

v.

ROGER DELANE WILSON,

Defendant.

Cause No.: CR 2017-00516

MOTION TO SEVER COUNTS

Assigned to Judge Conlogue

COMES NOW the Defendant, ROGER D. WILSON, by and through his attorney, STEVEN D. WEST, and hereby moves to sever Counts 5 and 6 of the Superceding Indictment, alleging weapons misconduct by a prohibited possessor, from the other counts of first degree murder, second degree murder, manslaughter, and disorderly conduct as alleged in Counts 1-4 of the Indictment.

This motion is supported by *Rule 13.4(a)* of the *Arizona Rules of Criminal Procedure* and the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

The defendant is charged in a six count indictment in which Counts 5 and 6 allege weapons misconduct by a prohibited possessor. These two counts have nothing to do with the first four counts, and they should be severed as a matter of law.

To have the jury told that the defendant is a prohibited possessor, would be so highly prejudicial as to preclude him from having a fair trial on the other charges in the indictment.

LAW:

Rule 13.4(a) of the *Arizona Rules of Criminal Procedure* provides that a defendant is entitled to a severance of counts when it is necessary to promote a fair determination of the guilt or innocence of the defendant. In the instant case, the defendant is entitled to a severance as a matter of right. *Rule 13.4(b)*, *Arizona Rules of Criminal Procedure*; *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996). Offenses may be joined if they fulfill the following requirements, if they: (1) are of the same or similar character; (2) are based on the same conduct or are otherwise connected together in their commission; or (3) are alleged to have been a part of a common

scheme or plan. *Rule 13.3(a), Arizona Rules of Criminal Procedure.*

Though generally relevant evidence is admissible unless otherwise excluded by statute or rule pursuant to *Rule 402, Arizona Rules of Evidence*, in order for any facts relevant to the weapons misconduct charge to be admissible in the case joined with the other charges, they must relate to an issue with some relevance. In this case, there is no "evidence (relating to the prohibited possessor count) having any tendency to make the existence of any fact (relating to murder charges) that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" *Rule 401, Arizona Rules of Evidence.*

It is clear that there is no reasonable determination that the charges in Counts 5 and 6 could possibly bolster the existence of the other counts. Certainly the fact that the defendant is alleged to have used a weapon in the commission of the alleged murder, does not, in any way, justify the inclusion of evidence that he has a prior conviction, which is a necessary element of the prohibited possessor (weapons misconduct) allegation. The elements of the charges are too dissimilar and of a totally different nature. There is nothing about the "possession" of a weapon that can add anything to the allegations of "using" the weapon in an alleged shooting.

The prejudice that would inure to the defendant is severe enough to warrant the severance, because of the inflammatory nature of the murder count that would

impact on the count dealing with the possession of a weapon. *United States v. Galindo*, 243 F.R.D. 660 (2007). The evidence of one of the crimes charged, would not necessarily be admissible on the other charge, and it would be patently unfair to have them tried together. The only remedy available is severance of the counts. *United States v. Galindo, supra*.

Joinder is not supported because the evidence is not "cross-admissible." Evidence of two "incidents" is admissible at the same trial only if the two acts have common features indicating a common design, scheme or plan. *State v. Valdez*, 23 Ariz.App. 518, 534 P.2d 449 (1975). The Arizona Supreme Court stated in *State v. Akins*, 94 Ariz. 263, 266, 383 P.2d 180, 183 (1963):

Similarities between the offenses . . . must be in those important aspects where normally there could be expected to be found differences.

There is no evidence inherent with either of the two types of charges that would be relevant to tend to prove the guilt or innocence of the defendant on the other charge(s). Even though the charges arose from a series of connected acts, it does not suffice to allow the admission of evidence of one "act" against the other. There is absolutely no evidence to show that the evidence on Counts 1-4 overlap with evidence on Counts 5 and 6.

The court, in *State v. Garland*, 191 Ariz. 213, 953 P.2d 1266 (App. 1998), pointed out that a denial of a severance is error if the evidence of the crimes to be severed would not be admissible at trial for an evidentiary purpose. If the facts relating to the severed counts do not fall under any of the exceptions of *Rule 404(b)*, of the *Arizona Rules of Evidence*, the counts must be severed. In the instant case, Counts 5 and 6 would be far too highly prejudicial to be admissible in any of the Counts 1-4, and a conviction on any one of those counts would be based on an improper consideration of a bad act that had no nexus to the other charges.

The joint trial of a charge of being a prohibited possessor with other charges might very well cause a jury to improperly consider evidence relating to the defendant's prior conviction and conclude that Mr. Wilson is a "bad guy" or that, if he had done it before, he probably is good for this case also. See *United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir. 1996). As the *Nguyen* court stated, "All of the Circuit Courts seem to agree that trying a felon in possession count together with other felony charges creates a very dangerous situation because the jury might improperly consider the evidence of a prior conviction when deliberating about the other felony charges."


The rules on joinder and severance are to be liberally applied, and where there is any doubt, the issue must be resolved in favor of the defendant. *State v.*

Roper, 140 Ariz. 459, 682 P.2d 464 (App. 1984). In *State v. Roper*, *supra*, the trial court abused its discretion by failing to sever two counts of the indictment from each other, when the differences in the charges were significant. When the charges can be easily distinguished, they should properly be severed. *State v. Henderson*, 116 Ariz. 310, 569 P.2d 252 (1977); *State v. Roper*, *supra*.

Furthermore, curative instructions are not sufficient to prevent a jury from making a determination of guilt on one charge and allowing it to influence the determination on other charges. A severance is required, since compelling prejudice would inure to the defendant from which the trial court is unable to protect him.

WHEREFORE the defendant requests that the Counts 5 and 6 of the indictment be severed from the other counts in the interests of justice and for the foregoing reasons.

RESPECTFULLY submitted this 5th day of June, 2019



Steven D. West
Attorney for Defendant Wilson

Copy of the foregoing
mailed/delivered this date to:

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